No. 89-369

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

The Clean Air Act, as amended, expressly establishes a partnership in which the state and federal governments each have distinct, but complementary, roles. Under the Act, the States determine the source-specific limitations necessary to achieve national goals set by EPA. The state plans and any revisions to them must be approved by EPA. The questions presented are:

1. Whether EPA's failure to act finally upon a state-approved revision to the State's plan within four months of its submission to EPA violates the express language of the Act and Congress's intent that the State have the primary role in implementing and enforcing air pollution measures.

2. Whether EPA's failure to act finally upon a state-approved revision within the four-month deadline when a source is in compliance with the revision limits EPA's authority to enforce the unrevised state plan against that source unless EPA demonstrates that it has authority under the Act to disapprove the proposed revision.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	3
A. Statutory Background	3
B. The Massachusetts SIP Revision	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. CONGRESS CHOSE A SCHEME OF COOPERATIVE FEDERALISM TO IMPLEMENT THE CLEAN AIR ACT	7
II. EPA MUST TAKE FINAL ACTION ON A SIP REVISION WITHIN FOUR MONTHS OF ITS SUBMITTAL	10
III. EPA HAS BREACHED THE LIMITS CONGRESS PLACED ON ITS AUTHORITY, THEREBY USURPING THE STATE'S ROLE AND FAILING TO ACT IN ACCORDANCE WITH LAW	14
A. EPA Has Breached The Limits Congress Imposed	14
B. EPA Is Usurping The State's Role	15
C. EPA Has Acted Arbitrarily, Capriciously, And Not In Accordance With Law	16
IV. THIS COURT SHOULD INTERPET THE ACT AS CONTEMPLATING A REMEDY THAT REQUIRES EPA TO ACT WITHIN STATUTORY LIMITS	18
CONCLUSION	25

TABLE OF AUTHORITIES

CASES: Page

American Cyanamid Co. v. EPA, 810 F.2d 493 (5th Cir. 1987) 10, 14
Bethlehem Steel Corp. v. EPA, 782 F.2d 645 (7th Cir. 1986) 14
Bowen v. American Hospital Ass'n, 476 U.S. 610 (1986) 17
Brock v. Pierce County, 476 U.S. 253 (1986) 20
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 13
Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480 (1947) 12
Connecticut v. EPA, 696 F.2d 147 (2d Cir. 1982) 7
Council of Commuter Organizations v. Gorsuch, 683 F.2d 648 (2d Cir. 1982) 10
Council of Commuter Organizations v. Thomas, 799 F.2d 879 (2d Cir. 1986) 10
Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983) 4, 10, 19
Friends of the Earth v. EPA, 499 F.2d 1118 (2d Cir. 1974) 17
General Motors Corp. v. EPA, 871 F.2d 495 (5th Cir. 1989) 10
Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) 12
Heckler v. Chaney, 470 U.S. 821 (1985) 17
Higgins v. Smith, 308 U.S. 473 (1940) 12
Indiana & Michigan Electric Co. v. United States EPA, 733 F.2d 489 (7th Cir. 1984) 14
Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) 11
Rainwater v. United States, 356 U.S. 590 (1958) 12
SEC v. Sloan, 436 U.S. 103 (1978) 13
Sierra Club v. EPA, 719 F.2d 436 (D.C. Cir. 1983), cert. denied, 468 U.S. 1204 (1984) 22
Sierra Club v. Ruckelshaus, 602 F. Supp. 892 (N.D. Cal. 1984) 22
Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) 9, 10, 17

TABLE OF AUTHORITIES—Continued

Page

United States v. Alcan Foil Products Division, 889 F.2d 1513 (6th Cir. 1989) 10, 11, 13, 14

STATUTES:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (1988) ..... *passim*
5 U.S.C. § 706 (1988) 17
Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1982 & Supp. V 1987) ..... *passim*
42 U.S.C. § 7409 (1982) 3
42 U.S.C. § 7410 (1982) ..... *passim*
42 U.S.C. § 7413 (1982) ..... *passim*
42 U.S.C. § 7420 (1982) 4, 9
42 U.S.C. § 7604 (1982) 18, 22
42 U.S.C. § 7607 (1982) 23
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 686 ..... 11, 12, 13
Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1982 & Supp. V 1987) 8
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (1982 & Supp. V 1987) 8
Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (1982 & Supp. V 1987) 8
Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* (1982 & Supp. V 1987) 8
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (1982 & Supp. IV 1986) 8

RULES AND REGULATIONS:

46 Fed. Reg. 51,386 (Oct. 20, 1981) 6
51 Fed. Reg. 42,391 (Dec. 2, 1986) 6
51 Fed. Reg. 42,392 (Dec. 2, 1986) 6
53 Fed. Reg. 36,011 (Sept. 16, 1988) 6
54 Fed. Reg. 2138 (Jan. 19, 1989) 14
54 Fed. Reg. 2139 (Jan. 19, 1989) 14

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

D. Currie, Air Pollution Federal Law & Analysis (1981) 8, 17

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Congress established a cooperative partnership between the States and the federal government to control air pollution. Under the Clean Air Act, as amended, 42 U.S.C.

§ 7401 *et seq.* (1982 & Supp. V 1987) (the "Act"), the States or their regional administrative bodies are obligated to meet federally established national standards setting maximum concentrations for air pollutants in outside air. Congress explicitly left to the state and local governmental bodies, operating within statutory and regulatory guidelines, the choice of which sources should be controlled to what degree so that the State's air quality meets the national standards. Congress expressly contemplated that States would revise these choices to account for local circumstances; the development of better, more efficient, or less costly control technology; or the adoption of new or more stringent federal standards. 42 U.S.C. § 7410(a)(2)(H) (1982). The Act requires a State to submit its revisions to EPA, but limits EPA's course of consideration (as to both time and substantive criteria).

Amici have an obvious and compelling concern in the questions (1) whether the Act imposes an obligation upon EPA to act finally upon each state-proposed revision to an applicable state implementation plan ("SIP") within four months of the revision's submittal to EPA, and (2) whether the Act, the Administrative Procedure Act, as amended, 5 U.S.C. § 551 *et seq.* (1988), and considerations based on federalism and sound public policy impose limits on EPA's enforcement of the unrevised SIP while EPA is considering the proposed revision.

Amici have a strong interest in requiring EPA to adhere to the statutory four-month period of consideration. Delays in EPA's approval create uncertainties regarding the States' primary role in establishing the emission limitations applicable to specific sources; undercut the enforcement of state-determined policies; reduce the likelihood that sources will make interim efforts to comply with state policies; and create incentives for sources to refuse to adopt newer, cleaner technologies in place of other control measures.

Similarly, *amici* are concerned with the remedy appropriate for EPA's delays in considering SIP revisions, including limitations on EPA's enforcement authority. It is essential that this Court interpret the Act as establishing a remedy that both provides incentives for EPA to act in a timely fashion and assures that EPA's delay does not give it greater authority or leverage over the States' choices than it possesses statutorily.

Amici submit that the decision of the court below is correct in holding that EPA must act finally on a revision to a state implementation plan within four months of the revision's submittal to EPA, but is wrong as to the constraints a breach of that four-month deadline imposes on EPA's enforcement of the unrevised plan. Because this Court's decision will have a direct effect on matters of importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

A. Statutory Background.

Under the Clean Air Act, EPA establishes National Ambient Air Quality Standards ("NAAQS"), which set limits on concentrations of certain pollutants in outside air so as to protect the public health and welfare. 42 U.S.C. § 7409 (1982). Each State then prepares a SIP that "provides for implementation, maintenance, and enforcement of [NAAQS] in each air quality control region (or portion thereof) within such State." 42 U.S.C. § 7410(a)(1) (1982). The SIP must include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of [NAAQS] including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution." 42 U.S.C. § 7410(a)(2)(B) (1982).

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[1] The parties' letters of consent, pursuant to Rule 37 of the Rules of the Court, have been filed with the Clerk.

Each State must submit its SIP to EPA for approval, which the statute requires EPA to grant within four months unless EPA determines that the SIP will not insure attainment of the national standards. 42 U.S.C. § 7410(a)(2) (1982). EPA may substitute its own implementation plan for a State's only when the state-submitted SIP is deemed unacceptable. 42 U.S.C. § 7410(c)(1) (1982).

The Act expressly contemplates that SIPs will be revised. Indeed, to be approved initially a SIP must contain provisions for its revision as new technologies become available, as standards change, or as required to assure continued maintenance of compliance status. 42 U.S.C. § 7410(a)(2)(H) (1982). Such revisions are subject to EPA approval in the same manner as initial submittals. 42 U.S.C. § 7410(a)(3) (1982).

The States are required to include enforcement programs in their SIPs. 42 U.S.C. § 7410(a)(2)(D) (1982). Congress also gave EPA authority to enforce SIP provisions under Sections 113 and 120 of the Act (42 U.S.C. §§ 7413 and 7420 (1982)), although primary enforcement is in the hands of the State. Before initiating an enforcement action, EPA must give notice to the State to permit the State to exercise its enforcement options. 42 U.S.C. § 7413(a)(1) (1982). When civil monetary penalties are to be assessed, "the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. § 7413(b) (1982).[2]

[2] Section 120 of the Act also allows EPA administratively to assess noncompliance penalties on sources failing to comply with state emission limitations. 42 U.S.C. § 7420 (1982). Such penalties are to prevent noncomplying sources from gaining an economic advantage over complying sources. *Duquesne Light Co. v. EPA*, 698 F.2d 456, 463 (D.C. Cir. 1983).

B. The Massachusetts SIP Revision.

As part of its obligations under the Clean Air Act, as amended in 1977, Massachusetts revised its SIP in 1979. These revisions required a car assembly plant owned and operated by General Motors ("GM") to achieve specified levels of emissions by December 1985. In late 1984 GM submitted a proposed schedule for installation of technology to comply with that obligation. Six months later, following discussions with state officials, GM proposed instead to construct a new facility and make significant capital investment in a new technology that would reduce emissions at the plant below those required by the 1979 revised SIP. Construction time for the new facility required an extension of the compliance deadline to December 1987. (EPA had already approved Massachusetts' request that it be given until December 31, 1987, to achieve compliance with the NAAQS.) The State, after consideration of a full administrative record, including a public hearing in which EPA participated, agreed with the new proposal (except that the deadline was extended only to August 1987), revised its SIP accordingly, and submitted that SIP revision to EPA in December 1985 for approval.

EPA, however, did not act finally on Massachusetts' revision within four months. Instead, some eight months after the submittal, EPA gave notice that GM was violating the unrevised SIP.[3] One year later, in August 1987, EPA filed suit against GM alleging that the violation was continuing. EPA's original complaint neither referenced the pending revision applicable to the facility nor the fact that the facility in question had been permanently closed and the new, lower-emitting facility was in operation. EPA did not act finally on the proposed revision for an additional year. Final disapproval was promulgated in September 1988 while this case was being

[3] Such notice is statutorily required before EPA can bring an enforcement action. 42 U.S.C. § 7413(a)(1) (1982).

briefed at the court of appeals. 53 Fed. Reg. 36,011 (Sept. 16, 1988).

EPA had expressly urged that facilities like GM's adopt the new technology and had announced a policy of favorable consideration regarding revisions. 46 Fed. Reg. 51,386 (Oct. 20, 1981). With regard to the GM facility, however, EPA apparently preferred an enforcement action rather than a revision. 51 Fed. Reg. 42,391, 42,392 (Dec. 2, 1986).

SUMMARY OF ARGUMENT

The Clean Air Act is to be implemented by cooperative federalism—Congress assigned distinct, but complementary, roles to federal and state governments. Under the statutory scheme, EPA determines the national goals, but the States decide how those standards will be achieved. State implementation plans are subject to only a limited review by EPA, and their enforcement is primarily a state function. The Act requires that EPA approve a SIP unless the SIP fails to meet one or more of eleven criteria specified by Congress, and that it do so within four months. The Act explicitly imposes on EPA review of SIP revisions the same substantive limitations, and implicitly imposes the same four-month time limit on EPA review, as every court of appeals that has addressed the issue has held. Prompt EPA action on SIP revisions is essential if the States are to perform their intended role of primary implementation and enforcement of air quality control measures.

By ignoring the statutory four-month time limit, EPA usurps the States' role through a "pocket veto" and avoids the discipline of the judicial review which the Act expressly provides for approval or disapproval of the State's plan. The uncertainty thus created is likely to delay source compliance with a SIP revision. When EPA, without passing finally upon the validity of a SIP revision, seeks to enforce the unrevised SIP, it substitutes its own judgment for that of the State concerning

the appropriate technology and emission limitations—matters that Congress expressly left for state determination. In addition, EPA assumes the enforcement role Congress prescribed for the State.

EPA's action—or inaction—also violates the Administrative Procedure Act, by effectively disapproving a SIP revision without establishing that it has a statutory basis for that decision and without any explanation.

This Court should clarify the remedies available when EPA has withheld final approval or disapproval of a state-submitted SIP revision for more than four months. We submit that EPA enforcement of a SIP under these circumstances is not barred, but should be conditioned on a showing that the revision does not meet one or more of the statutory criteria—the same showing required for formal EPA disapproval of the revision. When EPA carries that burden injunctive relief and future penalties may be appropriate, but the Court should preclude the imposition of monetary penalties upon a source that has been complying in good faith with a state-submitted SIP revision. Our proposal serves to focus all parties' resources on improvement of the nation's air quality, by encouraging source compliance with state plans, including state revisions. The proposed remedy also protects the States' implementation and enforcement role under the Act, and provides an incentive for EPA to act promptly to approve or disapprove SIP revisions.

ARGUMENT

I. CONGRESS CHOSE A SCHEME OF COOPERATIVE FEDERALISM TO IMPLEMENT THE CLEAN AIR ACT.

Congress intended that the Clean Air Act would be implemented through cooperative federalism—a partnership in which the state and federal governments each have distinct, but complementary, roles. See, *e.g.*, *Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982)

(describing the Act as a "bold experiment in cooperative federalism"). Congress recognized that States are more closely attuned than the federal government to local conditions and concerns and that policies with important local effects should be determined by local agencies.[4] Thus, Congress has regularly turned to state-federal partnerships to achieve environmental regulatory goals and has given the States major responsibility for carrying out substantive aspects of the regulatory schemes.[5]

The congressionally established scheme under the Clean Air Act requires EPA to determine the national goals

[4] The whole history of halting federal advances into fields such as these reflects a firmly rooted tradition that federal intervention should be a last resort and should be limited to the minimum consistent with effectuating the statutory ends.

> It is tempting to dismiss this tradition impatiently as a vestige of an antiquated view of state sovereignty. Since the states cannot handle pollution, perhaps the federal government should do the job simply and efficiently itself. Professor Luneburg sounds a warning note: "[I]t would be unlikely that one federal agency could easily design plans individually suited to the needs and conditions of the different areas of the nation," and "the probable local resistance to federally designed measures" should not be underestimated. Not least, the specter of a huge army of all powerful federal bureaucrats is enough to give pause; the analogy of federalizing the police suggests there may still be safety against arbitrary governmental action in the dispersal of power.

D. Currie, Air Pollution Federal Law & Analysis § 4.34 (1981) (footnotes omitted).

[5] Such statutes include the 1972 and 1977 amendments to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1982 & Supp. V 1987); the Safe Drinking Water Act, as amended, 42 U.S.C. § 300f *et seq.* (1982 & Supp. V 1987); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund"), 42 U.S.C. § 9601 *et seq.* (1982 & Supp. V 1987); the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (1982 & Supp. IV 1986); and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (1982 & Supp. V 1987).

and insure that States meet these goals. But while EPA sets NAAQS, each State, not EPA, determines how the standards set by EPA will be achieved. EPA "is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975) (footnote omitted).

In enforcement, as well, Congress intended that States have primary responsibility and gave EPA a limited role. EPA may assume full responsibility for enforcement of a SIP only if EPA finds that a State has failed to enforce its implementation plan and only after it provides a thirty-day notice to the State. 42 U.S.C. § 7413(a)(2) (1982). EPA may initiate individual enforcement actions only after first giving the State thirty days' advance notice. 42 U.S.C. § 7413(a)(1) (1982).[6]

Congress gave the States great flexibility in meeting their responsibility of assuring air quality within their borders. "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train*, 421 U.S. at 79. The State's discretion "includes the continuing authority to revise choices about the mix of emission limitations." *Id.* at 87.

To achieve its intent that the States have primary authority for air quality within their boundaries, Congress placed both substantive and time limits on EPA's review of state implementation plans. EPA can disapprove a SIP or SIP revision only if it fails to meet one or more of the eleven criteria prescribed by Congress in

[6] EPA may also delegate to a State the authority to assess and collect noncompliance penalties when appropriate. 42 U.S.C. § 7420(a)(1)(B) (1982).

Section 110(a)(2)(A)-(K), 42 U.S.C. § 7410(a)(2)(A)-(K) (1982).

If a SIP or a SIP revision meets these criteria, EPA has no discretion and must approve the state submission even if EPA would pick a different mix of emission limitations:

> Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2) . . . .

Train, 421 U.S. at 79 (emphasis in original).

II. EPA MUST TAKE FINAL ACTION ON A SIP REVISION WITHIN FOUR MONTHS OF ITS SUBMITTAL.

To assure clear statements of pollution control requirements and to hasten compliance with the state-determined source-specific limitations, Congress imposed time constraints on EPA's review of SIPs—requiring final action within four months after a State makes its submission. 42 U.S.C. § 7410(a)(2) (1982). The four-month deadline also applies to EPA's review of state-submitted revisions to SIPs, as the court below and every other court of appeals that has addressed the issue has held.[7]

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[7] Pet. App. 11a-12a; *United States v. Alcan Foil Products Division*, 889 F.2d 1513, 1518 (6th Cir. 1989); *American Cyanamid Co. v. EPA*, 810 F.2d 493, 495 (5th Cir. 1987); *Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Organizations v. Gorsuch*, 683 F.2d 648, 651-52 n.2 (2d Cir. 1982). See also *General Motors Corp. v. EPA*, 871 F.2d 495, 498 (5th Cir. 1989); *Council of Commuter Organizations v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986).

EPA's contrary argument, that Section 110(a)(3)(A)[8] incorporates by reference only the substantive criteria of Section 110(a)(2), has never been accepted as the correct reading of congressional intent. The Sixth Circuit correctly noted that "it seems clear to us that Congress intended to incorporate the time limit, and felt it had done so by referring to 'the requirements of paragraph (2).'" *United States v. Alcan Foil Products Division*, 889 F.2d 1513, 1518 (6th Cir. 1989).

The statute expressly references the Administrator's obligation to approve or disapprove revisions "within the required four month period." 42 U.S.C. § 7410(g)(1). EPA argued below that Section 110(g)(1) was irrelevant to the true meaning of Sections 110(a)(3)(A) and 110(a)(2) because subsection (g) was enacted in the 1977 Amendments to the Clean Air Act, while subsections (a)(2) and (a)(3)(A) were enacted in 1970. EPA's argument is both legally incorrect and factually specious. This Court has long held that a statute must be read as a whole, regardless of the enactment dates of individual sections. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2278 n.2 (1989) ("We . . . read CERCLA and SARA [amendments to CERCLA] together, and argue that SARA's wording must inform our understanding of the other definitional sections of the statute.")[9]; see also

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[8] Section 110(a)(3)(A) provides that: "The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings." 42 U.S.C. § 7410(a)(3)(A) (1982).

[9] Justice White's concurring opinion in *Union Gas* does not require a different result in this case. Justice White's point of departure (see 109 S. Ct. at 2290 n.1) was in a case requiring stringent review to establish an "unmistakable statement" of congressional intent to abrogate the States' sovereign immunity. The issue in this case does not involve the States' liability, and thus the statutory interpretation need not meet that higher standard of review.

Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 488 (1947) ("Our task is to give all of it [the Trading With the Enemy Act and later amendments thereto]—1917 to 1941—the most harmonious, comprehensive meaning possible.").[10]

Indeed, subsection 110(g) is particularly relevant because, in passing the 1977 Amendments, Congress understood that the changes would require further SIP revisions, which were specifically referenced in the criteria in Section 110(a)(2).[11] Thus, in citing the "required four month period" in subsection 110(g), Congress was stating the time limit it imposed on EPA's review of those SIP revisions compelled by specific requirements

[10] While after-the-fact "legislative history" is not probative as to the intent of an earlier Congress, amendments of a statute by a later Congress are certainly probative of any other section in the statute. The cases cited by EPA in its briefs below do not refuse to interpret an act and its amendments together when the act as amended is the applicable law. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 63 n.4 (1987) (refusing to rely on conflicting legislative history of amendments passed after the court of appeals had issued its opinion); *Rainwater v. United States*, 356 U.S. 590, 593 (1958) (refusing to rely on 1918 amendment to criminal penalties to interpret separately codified 1863 civil penalties); *Higgins v. Smith*, 308 U.S. 473, 479-80 (1940) (refusing to use Revenue Act of 1934 to interpret tax liability under Revenue Act of 1932).

[11] See, *e.g.*, 1977 amendments to Section 110(a)(2) mandating that SIPs meet numerous requirements added by other sections of the 1977 Amendments: 110(a)(2)(D) (adding references to permits required by Parts C and D, which were added by the 1977 Amendments); 110(a)(2)(E) (adding reference to Section 126, also added in 1977, regarding interstate pollution abatement requirements; 110(a)(2)(F) (adding reference to Section 128, also added in 1977, regarding composition of state boards); 110(a)(2)(H) (requiring SIPs to provide for revision when EPA finds a plan fails "to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977"); 110(a)(2)(I) (adding reference to requirements added in 1977 regarding nonattainment areas); 110(a)(2)(J) and (K) (new subparagraphs requiring that SIPs meet various provisions added by the 1977 Amendments). Pub. L. No. 95-95, § 108, 91 Stat. 686, 693-94 (1977).

added in 1977 and all other revisions. Far from being a *post hoc* assertion by a later Congress of an earlier Congress's intent, subsection 110(g) represents the then-current expression of a Congress contemplating plan revisions and defining the appropriate procedural and substantive requirements.[12]

Congress's intention that the Clean Air Act be implemented through cooperative federalism—a partnership between the federal and state governments—reinforces this interpretation. Only if EPA promptly reviews the state-submitted SIP revisions can the State perform its congressionally intended role as the primary implementer and enforcer of its air quality control measures. Although such expeditious action may be difficult, EPA cannot be allowed to circumvent Congress's policies by disregarding the deadline.[13]

[12] EPA's contrary interpretation of the statute is not entitled to deference. A reviewing court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). Even if the Act were considered ambiguous or silent on a particular issue, a reviewing court should not defer to an agency's interpretation that "frustrate[s] the congressional policy underlying a statute." *SEC v. Sloan*, 436 U.S. 103, 118 (1978). Here, EPA's interpretation frustrates the statutory purpose because it allows EPA to usurp the role that Congress intended for the States. Furthermore, as the court below warned, "we think it dangerous to defer in a situation such as this where the Agency has a substantial institutional interest in not imposing constraints on itself." Pet. App. 11a; see also *Alcan Foil Products*, 889 F.2d at 1518.

[13] There is nothing in the record to support the court of appeals' assertion that EPA would usually require more than four months to act finally on a SIP revision.

III. EPA HAS BREACHED THE LIMITS CONGRESS PLACED ON ITS AUTHORITY, THEREBY USURPING THE STATE'S ROLE AND FAILING TO ACT IN ACCORDANCE WITH LAW.

EPA, by bringing an action to enforce an existing SIP while holding in limbo a state-approved SIP revision for more than four months, is attempting to accomplish through inaction what Congress has forbidden it from doing directly. EPA's action thereby usurps the responsibilities Congress intended for the States and is arbitrary, capricious, and not in accordance with law.

A. EPA Has Breached The Limits Congress Imposed.

There is no issue that EPA has grossly violated the four-month statutory deadline imposed by Congress for EPA consideration of SIP revisions. EPA took almost three years to take final action on the Massachusetts revision at issue here (Pet. App. 6a-8a) and even longer to review the SIP revisions at issue in another enforcement case. *American Cyanamid Co.*, 810 F.2d at 497 (no decision after four and one-half years). See also *Alcan Foil Products*, 889 F.2d at 1516-17 (final action took two and one-half years).[14]

EPA's prolonged review of SIP revisions also violates the substantive limits placed on EPA by the Act. When EPA fails to act for three, four, or more years on a state-submitted revision, EPA exercises a "pocket veto" disapproving the State's plan. See *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 650 (7th Cir. 1986); *Indiana & Michigan Electric Co. v. United States EPA*, 733 F.2d 489, 492 (7th Cir. 1984). EPA's effective disapproval comes without any determination as to whether the revision meets the congressionally mandated criteria or any evidence that EPA has considered only the factors allowed by Congress.

[14] EPA has admitted that it often exceeds even the fourteen-month administrative schedule it has set for itself. 54 Fed. Reg. 2138, 2139 (Jan. 19, 1989).

This case exemplifies the problems created by such a "pocket veto." First, EPA's refusal to address the revision prevents it from coming into full effect,[15] without any of the protection and limitations on discretion required by Congress. Without a final action, EPA's effective disapproval is outside the statutory framework and can neither be disputed by a State or source nor controlled by the courts.

Second, as discussed more fully below, EPA's inaction, coupled with its attempt to enforce the existing SIP, effectively substitutes EPA's judgment for the State's decision regarding the appropriate technology, emission limitations, and enforcement avenues to be applied to a particular source—a decision Congress expressly left to the State.

Third, by refusing to act on the revision while seeking enforcement of its preferred position, EPA has harmed attainment and maintenance of air quality standards by undercutting any incentive for sources to accept and comply promptly with state revisions. During the period in which EPA holds the State's revision in limbo, industry does not know which emission limitation ultimately will apply. Such uncertainty over a period of several years is likely to delay compliance or at least to delay investment in expensive air pollution control equipment. Thus, despite the Act's preference for revisions as a means to upgrade technology and limitations, EPA's ongoing failure to act makes such revisions either a nullity or, as here, a gamble for both the State and the source.

B. EPA Is Usurping The State's Role.

In addition to violating its assigned role under the Act, EPA's "pocket veto" of state-submitted revisions destroys the cooperative federalism by which Congress intended

[15] Until the revision has been approved by EPA, Section 110(d) of the Act defines the "applicable implementation plan" as the unrevised SIP.

the Act to be implemented. By its delayed action, EPA rather than the State determines the applicable mix of emission limitations and prevents the State from proposing a better solution.

EPA's inaction also usurps the State's enforcement role. By establishing a revision, the State has made both a policy decision as to the proper emission limitations and an enforcement decision regarding the source. EPA's failure to act expeditiously leaves the source bound by a state regulatory requirement different from the federal requirement and in many instances unable to comply with both. It is precisely this regulatory limbo that Congress sought to avoid by requiring expeditious action.

EPA's infringement on the State's role is even more egregious when EPA couples the delayed review of a state-approved revision with an attempt to enforce the existing SIP. In that situation, EPA not only prevents the State from carrying out its duties under the Act, but EPA arrogates those duties unto itself. By attempting to enforce the existing SIP, EPA supplants the revision with its own views as to the appropriate emission limitations and enforcement choices. As this Court has recognized, Congress decided that the States would determine source-by-source emission limitations and that EPA could take over that role only upon finding that a State was not complying with the requirements of the Act. 42 U.S.C. § 7410(c)(1) (1982).

C. EPA Has Acted Arbitrarily, Capriciously, And Not In Accordance With Law.

EPA's "pocket veto" of a state-submitted SIP revision also violates the Administrative Procedure Act. Because EPA's lengthy review of a state-approved revision coupled with enforcement of the existing SIP is essentially a disapproval of the State's revision during the time the revision is under review, EPA's actions must be subject to the same limits as an outright disapproval of the revi-

sion. To hold otherwise would circumvent Congress's intent by placing form above substance. Thus, EPA's disapproval of SIPs and SIP revisions is subject to the limitation under the APA that EPA's action not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (1988); see, *e.g.*, *Friends of the Earth v. EPA*, 499 F.2d 1118, 1123 (2d Cir. 1974); D. Currie, Air Pollution Federal Law & Analysis § 9.01 (1981).

This Court has recognized that Congress has explicitly set forth both the factors EPA is required to consider and the bounds beyond which EPA cannot stray in reviewing a SIP revision. *Train*, 421 U.S. at 80. Clearly, EPA would be acting arbitrarily, capriciously, and not in accordance with law if it disapproved a SIP revision for a reason other than those listed in Section 110(a)(2)(A)-(K) of the Act. EPA also is required to explain the rationale and factual basis for its decision. See, *e.g.*, *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 627 (1986) (plurality opinion).

If EPA were free to enforce an existing SIP while a SIP revision has been awaiting EPA approval for more than four months, EPA would by its inaction acquire the authority to disapprove a SIP revision for any reason (whether allowed by Congress or not) and without an explanation to anyone. Direct action of this sort by EPA would violate both the Clean Air Act and the APA. Given that Congress has limited EPA's direct action, EPA cannot be allowed to exercise unfettered discretion when it has failed to act as required by Congress.[16]

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[16] The issue here, of course, is not whether the agency generally has discretion to enforce, nor whether enforcement decisions can be reviewed. Even though an agency's decision not to prosecute or enforce is generally unreviewable as action committed to agency discretion, an enforcement action "at least can be reviewed to determine whether the agency exceeded its statutory powers." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The issue presented here is whether the agency can effectively broaden its power or

IV. THIS COURT SHOULD INTERPET THE ACT AS CONTEMPLATING A REMEDY THAT REQUIRES EPA TO ACT WITHIN STATUTORY LIMITS.

In interpreting the Act to determine the remedy when EPA has violated the statutory scheme, this Court must give full effect to Congress's intentions (1) that progress be made toward achieving and maintaining national air quality standards; (2) that the State play the primary role in implementing the Act; and (3) that EPA's discretion be defined by congressionally prescribed limitations. Neither the parties nor the courts of appeals have suggested a remedy for EPA's breach of the four-month deadline that adequately meets these goals. An appropriate remedy must give EPA an incentive to act within the statutory deadline and must also prevent EPA from acting in excess of its statutory authority. We believe that these goals can best be met through emphasizing injunctive relief to bring a source into compliance with the appropriate SIP and by limiting monetary penalties when a source has complied in good faith with a state-approved SIP revision.

We submit that the proper remedy is not to bar EPA enforcement, but to condition it on a demonstration that EPA's discretion has been appropriately confined.[17]

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discretion beyond that which Congress granted and then assert that its usurpation of power is unreviewable.

[17] A complete bar to enforcement proceedings is contrary to Congress's carefully crafted scheme. Section 110(d) of the Act provides that the existing SIP is the "applicable implementation plan" for enforcement purposes, and Congress granted explicit (although conditioned) authority to EPA to enforce the "applicable implementation plan." Both EPA and the States have authority to enforce the Act through injunctive and penalty provisions, and citizen suits to prevent or stop violations are also expressly permitted, 42 U.S.C. § 7604(a). It would be anomalous to create a situation in which States could enforce, private citizens could enforce, but the expert federal agency with explicit statutory authority could not.

Where a State has submitted a relevant SIP revision, any EPA enforcement should explicitly take into account the revision and the statutory criteria limiting EPA's discretion. We propose simply that EPA's authority be limited to enforcing the appropriate SIP—the SIP as revised (if the revision meets the criteria under the Act) or the SIP as unrevised (if the revision does not meet the Act's requirements)—and that the burden of demonstrating that the revision does not meet the statutory tests be laid expressly on EPA. EPA should not be allowed to enforce the unrevised SIP unless it affirmatively and specifically alleges, and establishes before the enforcing court, a basis for disapproving the state-submitted SIP revision.[18]

Where a state-approved revision meets the Act's criteria, EPA's only legitimate statutory role is to assure enforcement of and compliance with the revised SIP on an appropriate and reasonable schedule. A revision such as in this case, which established a schedule of compliance and with which GM apparently complied, should not be

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[18] The discussion in text concerns only enforcement actions brought after the four-month review period allowed to EPA for action on state-submitted SIP revisions. Even within the four-month period, however, the pendency of a SIP revision should be considered in any enforcement proceeding. Thus, even though the unrevised SIP is the "applicable" SIP under Section 110(d) of the Act, EPA cannot act arbitrarily. Compelled compliance with the existing SIP when EPA has no discretion but to approve the submitted revision would be arbitrary and capricious because it would enforce a provision that will soon expire, *i.e.*, once EPA approves the revision or the four-month period runs.

For the same reasons, we believe that the imposition of penalties under Section 113 of the Act during the four-month review period is also subject to limits. During the four-month review period, any penalties must be subject to the proper discretion of the court, with careful review to prevent the arbitrary imposition of penalties. (EPA cannot impose penalties administratively on the source under Section 120 while the SIP revision is under review. *Duquesne Light*, 698 F.2d at 471.)

effectively gutted by EPA's inaction unless EPA can show that the revision violates the Act's criteria.[19]

We believe that the overall statutory scheme requires that EPA's enforcement discretion be confined by express consideration and explanation of the relation between EPA's proposed enforcement and the submitted revision. Where the appropriate showing is made, EPA could obtain injunctive or other relief to establish a schedule for compliance with the unrevised SIP.[20]

The Court's remedy for EPA's undue delay should also generally preclude Section 113 monetary penalties on sources complying in good faith with SIP revisions to assure that the possibility that penalties will be imposed does not inhibit source compliance with the limitations and deadlines that the State has determined to be appropriate.[21] In our view, the source's good faith compliance

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[19] We note that EPA's failure to act on a revision also violates the congressional intent that States be given the opportunity to correct the flaws in any noncomplying revision, 42 U.S.C. § 7410 (a)(3)(B) (1982). EPA's one-two combination of failing to act on the revision while enforcing the unrevised SIP withholds from the State its statutorily provided opportunity to correct the submitted revision.

[20] Such relief is no longer at issue in the case before the Court because EPA dropped its request for injunctive relief once it learned that GM's allegedly noncomplying facility had been closed permanently prior to initiation of this action. Compare Complaint, J.A. 12, ¶ (a), with Amended Complaint, J.A. 117.

[21] The limitation of monetary penalties does not run afoul of *Brock v. Pierce County*, 476 U.S. 253 (1986). EPA still would have enforcement powers, so our proposed remedy does not "divest the [government] of jurisdiction to act after that time." 476 U.S. at 266. Furthermore, unlike the limitation proposed in *Brock*, where the public arguably would have lost money to which it would have been entitled if the government had acted promptly, the proposed limit on penalties in this case does not keep from the federal government money to which it would be entitled if EPA had acted promptly. Rather, the enforcement conditions simply focus the attention of all involved parties on the proper statutory criteria and timetables.

with the relevant state-determined limitations should affect not only the amount but also the availability of penalties. The threat of penalties for the period of EPA's delay requires a source either to ignore the State's determination of limitations and compliance deadlines or to gamble on EPA's approval. Where the four-month review period has passed without EPA disapproval of the SIP revision, a source should be expected to comply with the state-approved revision and should not be penalized for doing so. If the revision meets the statutory criteria, source compliance is within the congressional intent; and EPA should not be able to seek penalties for conduct Congress sought to foster.

Should EPA demonstrate that the revision does not meet statutory criteria, the court should set an appropriate schedule for compliance with the existing SIP. Penalties under Section 113 should then be levied for violation of that schedule, but not for the period of the source's good faith compliance with the state-approved revision.[22] This interpretation balances the congressional intent to let States determine the source-specific emission limitations and enforcement measures with the availability of penalties for those who do not comply with the SIP as finally determined.

The Act establishes limitations on EPA's enforcement. See 42 U.S.C. § 7413(b) (1982). Clear guidelines are

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[22] Of course, where, at the time of enforcement, the source is in compliance with neither the revision nor the unrevised SIP, penalties are appropriate. Moreover, where EPA can show that the revision is a mere contrivance or sham with no reasonable air pollution control purpose, the imposition of penalties back to the notice date may be appropriate. But neither of these exceptions is presented by this case.

essential here, to assure that all parties, including sources subject to SIP revisions, understand and respond to the primacy Congress gave state determinations of source-specific requirements.[23]

By focusing all parties' resources on compliance with a state-approved plan or revisions that meet statutory criteria, our proposed remedy protects the public health and welfare and furthers Congress's goal of improving the nation's air quality. Injunctive relief is available to assure compliance with the provisions necessary to achieve the national air quality standards. The limitation on monetary penalties gives industry incentive to comply with State limitations and schedules but allows EPA to seek monetary penalties against egregious violators that are failing to comply with any SIP provision.

Our proposed remedy also protects the State's role and gives EPA incentive to act promptly in conformity with its statutory duty.[24] The requirement that EPA show

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[23] The additional remedy proposed by the court below of allowing courts to consider EPA's delay as a relevant factor in assessing monetary penalties does not significantly increase industry's incentive to comply quickly because it fails to decrease the uncertainty as to which SIP provisions will govern.

[24] For these reasons, our remedy is superior to a mandamus action under Section 304 of the Act, 42 U.S.C. § 7604 (1982). At most, a mandamus action addresses only half of the problem—EPA's failure to act within the statutory deadline. Even then, EPA's record for complying with court-ordered deadlines is not promising. See, *e.g., Sierra Club v. Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984) (holding EPA in contempt for failing to meet a court-ordered deadline after EPA had already failed to meet the statutory deadline); see also *Sierra Club v. EPA*, 719 F.2d 436, 469-70 (D.C. Cir. 1983) (detailing EPA's failure to promulgate statutorily required regulations in six years where the statutory deadline was six months), *cert. denied*, 468 U.S. 1204 (1984). There is little reason to think that a court-imposed four-month deadline would make EPA act more quickly than a statutorily imposed four-month deadline. Requiring a State or source to bring a mandamus action is also unfair because it imposes additional costs on them merely to seek performance of EPA's required duties. Congress expected all parties to focus on compliance with the chosen state policies, rather than battling each other over how soon EPA must act in considering those policies.

Moreover, a mandamus action will only compel a decision, not determine the proper choice. It thus fails to provide an incentive for industry to comply quickly with the State's chosen emission limitations.

that it has justification to disapprove the SIP revision in order to enforce the existing SIP imposes no greater limitation than that expressly provided by the Clean Air Act and the APA.[25] The State's policy choices are protected because EPA is allowed to override them only if it can show that it has a statutory basis to do so.[26] The limitation on monetary penalties if a source is in compliance with a state-approved SIP revision further protects the State's role and gives EPA an incentive to act promptly if it believes that the revision should be disapproved.[27]

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[25] There can be no reasonable argument that requiring EPA to make a *prima facie* showing of its basis to disapprove the revision contravenes the exclusive jurisdiction of the courts of appeals to review EPA's final approval or disapproval of SIP revisions, 42 U.S.C. § 7607(b)(1) (1982). That exclusive jurisdiction applies only where a final administrative action has occurred. Where EPA has precluded such review by its delay, and then brings an enforcement action, the Act plainly contemplates review of EPA's actions in the enforcement case. See 42 U.S.C. § 7607(b)(2) (1982).

[26] A SIP revision is presumptively valid because States are presumed to act in good faith. The presumptive validity of state-submitted revisions is also borne out by the limitations Congress placed on EPA's ability to disapprove revisions. Congress, while recognizing that the States' economic interests may give a State reason to consider the source's concerns, expressly provided for state authority, and EPA should not benefit from an assumption that a State would submit an inappropriate revision.

[27] The prohibition on monetary penalties if a source is complying with the state-approved revision also addresses a serious potential issue regarding EPA's credibility. Where, as here, EPA's disapproval of the state-approved revision has no effect except perhaps

This enforcement scheme also addresses EPA's asserted fear that the States will flood EPA with disingenuous requests. EPA has made no showing that Massachusetts or other States have submitted disingenuous requests for revisions, whether by industry cooperation or otherwise. In any event, if a revision clearly disregarded the criteria established by EPA and Congress, then EPA should be able to dispose of the revision promptly; and prompt action by EPA would control any such practice by the States. Finally, if the proposed revision were not made in good faith, EPA could enforce the existing SIP because the revision would fail to meet the criteria for approval.

Thus, our proposed remedy gives full and balanced effect to the entire congressional scheme, leaving EPA with neither reduced nor enhanced authority or discretion, and permits the States to fulfill their role within our federal system and the statutory limitations.

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on EPA's collection of monetary penalties, there could be an appearance that EPA is acting improperly.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed as to the holding that EPA is required to act on revisions to state implementation plans within four months and reversed as to the appropriate remedy when EPA brings an enforcement action on the unrevised SIP after a revision has been pending for more than four months.

Respectfully submitted,

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